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Supreme Court of United States.

OCTOBER TERM, 1899. No. 174.

THE CAMDEN AND SUBURBAN RAILWAY COMPANY, Plaintiff in Error, vs. DAVID S. STETSON, Defendant in Error.	ON CERTIFICATE FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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BRIEF OF HOWARD CARROW,
for Defendant in Error.

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I respectfully submit that the abstract questions presented by the certificate in this case are concluded by

Union Pacific R. R. Co. vs. Botsford, 141 U. S. Rep., 250.

Ex parte Fish, 113 U. S. Rep., 713.

In the Union Pacific R. R. Co. vs. Botsford, 141 U. S. Reports, 250, Mr. Justice Gray, in delivering the opinion of the Court (page 251), said:

"The single question presented by this record is "whether, in a civil action for an injury to the person, the "Court, on application of the defendant and in advance of "the trial, may order the plaintiff, without his or her con- "sent, to submit to a surgical examination as to the extent "of the injury sued for. We concur with the Circuit "Court in holding that it had no legal right to make and "enforce such an order.

"No right is held more sacred, or is more carefully "guarded by the common law, than the right of every in- "dividual to the possession and control of his own person, "free from all restraint or interference of others, unless "by clear and unquestioned authority of law. As well said "by Justice Cooley, 'the right to one's person may be said "to be a right of complete immunity; to be let alone."

"The inviolability of the person is as much invaded by "a compulsory stripping and exposure as by a blow. To "compel anyone, especially a woman, to lay bare the body, "or to submit it to the touch of a stranger without lawful "authority or process commanding such an exposure or "submission, was never known to the common law in the "administration of justice between individuals, except in "a very small number of cases, based upon special reasons "and upon ancient practice, coming down from ruder ages, "now mostly obsolete in England and never, so far as we "are aware, introduced into this country."

The Court, on page 256, says:

"But this is not a question which is governed by the "law or practice of the State in which the trial is had. It

"depends upon the power of the National Courts under the "Constitution of the United States. * * * Con- "gress has enacted that the mode of proof at the trial of "actions at common law shall be by oral testimony and "examination of witnesses in open court.

"The provisions of section 914 of the U. S. Revised "Statutes, by which practice, pleadings, forms and modes "of proceeding in the Courts of each State are to be fol- "lowed in actions at law in the Courts of the United States "held within the same State, neither restricts nor enlarges "the power of these Courts to order the examination of "the parties out of Court.

"So we say here. The order moved for subjecting the "plaintiff's person to examination by a surgeon without "her consent and in advance of the trial was not ac- "cording to the common law, to common usage or to the "statutes of the United States."

In ex parte Fish, 113 U. S. Rep., page 713, the Court held:

"The principle that in actions at law, the laws of the "States shall be regarded as rules of decision in the Courts "of the United States, sec. 721 Rev. Stat., and that the "practice, pleadings and forms and modes of proceedings "in such cases shall conform as near as may be to those "of the Courts of the States in which the Courts sit (sec. "914) is applicable only where there is no rule on the same "subject prescribed by act of Congress, and where the "State rule is not in conflict with any such law.

"The statute of *New York, which permits* a party to a "suit to be examined by his adversary as a witness at any "time previous to the trial in an action at law, is in con-

"flict with the provisions of the Revised Statutes of the "United States which enacts that, 'The mode of proof "in the trial of actions at common law shall be by oral tes- "timony and examination of witnesses in open court, ex- "cept as hereinafter provided.' (Sec. 861.)

"None of the exceptions afterwards found in secs. "863, 866 and 867 provide for such examination of a "party to the suit in advance of the trial as the statute of "New York permits.

"The Courts of the United States, sitting in New "York, have no power, therefore, to compel a party to "submit to such an examination, and no power to pun- "ish him for a refusal to do so."

The place of residence of the litigating parties, at the time the cause of action arose, cannot possibly affect the vital question, which is whether or not the Federal Courts will enforce a State practice statute when said Courts have their own mode of procedure, &c.

I have not discussed any of the matters of fact which plaintiff's counsel have attempted to incorporate into this case, for the obvious reason that there are no matters of fact whatever before this Honorable Court; this Court has simply been asked to deal with the abstract question certified by the U. S. C. C. of Appeals.

The questions involved in the certificate before this honorable Court are *stare decisis*, and the queries propounded by the Honorable Circuit Court of Appeals in the Third Circuit should be answered in the negative.

HOWARD CARROW,
For Defendant in Error.